Messrs Tai Choi Yu & Co, Advocates (suing as a firm and Tai Choi Yu as sole-proprietor) v The Court of Appeal of Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(IM)(NCVC)-110–04 OF 2016
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
8 MARCH 2017

Civil Procedure — Setting aside — Application for — Appellant brought civil action against respondents — Senior federal counsel filed memorandum of appearance on behalf of respondent — Appellant applied to set aside memorandum of appearance under O 18 r 19 of the Rules of Court 2012 — Whether respondents could be represented by senior federal counsel — Whether Court of Appeal had jurisdiction to sit and to hear appeal — Federal Constitution arts 121(1A) & 145 — Rules of Court 2012 O 18 r 19

Memorandum of appearance was filed by the learned senior federal counsel on behalf of the respondents in relation to a civil action by the appellant herein Tai Choi Yu as plaintiff, against all the three respondents. It ought to be noted that the second and third respondents were the presiding judges in the said civil action by the appellant. The appellant then vide High Court encl 6 and pursuant to O 18 r 19 of the Rules of Court 2012 filed an application to set aside the memorandum of appearance filed by the SFC; and set aside the purported representation of the respondents by the Federal Attorney General's Chambers. At the end of the proceedings, the learned trial judge dismissed encl 6, hence the present appeal. The issues arose were whether the present court ('the Court of Appeal') could hear the present appeal; and whether the respondents could be represented by the federal counsel of the Federal Attorney General's Chambers. The appellant had also raised a preliminary issue that the court, sitting on the panel of the Court of Appeal had no jurisdiction to sit and to hear this appeal.

Held, dismissing the appeal with costs of RM5,000:

(1) It was the appellant himself who lodged the appeal to the Court of Appeal, and it was the court's constitutional duty to hear and decide on the appeal. Further, it was the appellant who lodged the present appeal before the court and in doing so, the appellant had submitted himself to the jurisdiction of the court. Therefore, he could not any longer raise issue questioning the jurisdiction of the court (see para 13).

(2) The first respondent, the Court of Appeal was constituted under art 121(1A) of the Federal Constitution ('the Constitution'). The jurisdiction of the Court of Appeal as stated in the Courts of Judicature Act 1964 amongst others, was to determine appeals from decisions of the High Court and such other jurisdiction conferred under federal laws. It was in that capacity too that the first respondent was being sued (see para 18).

(3) The grounds raised by the appellant in the present appeal were devoid of any merit. The Attorney General was representing the respondents under his wide-ranging powers embedded in art 145 of the Constitution to uphold the sanctity of the institution of justice. The wide-ranging powers of the Attorney General under art 145 of the Constitution necessarily included the power to represent not only the government but also anybody or person performing any function under the Constitution. Clearly this was one of such case (see paras 21, 23 & 27).

[Bahasa Malaysia summary

Memorandum kehadiran telah difailkan oleh peguam kanan persekutuan bagi pihak responden-responden berkaitan tindakan sivil oleh perayu di mana Tai Choi Yu sebagai plaintif, terhadap kesemua tiga responden. Perlu ditekankan bahawa responden-responden kedua dan ketiga adalah hakim-hakim yang bersidang dalam tindakan sivil tersebut oleh perayu. Perayu kemudian melalui lampiran 6 Mahkamah Tinggi dan menurut A 18 k 19 Kaedah-Kaedah Mahkamah 2012 telah memfailkan permohonan untuk mengetepikan memorandum kehadiran yang difailkan oleh PKP; dan mengetepikan representasi bagi tujuan responden-responden oleh Jabatan Peguam Negara Persekutuan. Di akhir prosiding, hakim perbicaraan yang bijaksana telah menolak lampiran 6, justeru rayuan ini. Isu-isu yang timbul adalah sama ada mahkamah ini ('Mahkamah Rayuan') boleh mendengar rayuan ini; dan sama ada responden-responden boleh diwakili oleh peguam persekutuan Jabatan Peguam Negara Persekutuan. Perayu juga telah menimbulkan isu awalan bahawa mahkamah, yang bersidang sebagai panel Mahkamah Rayuan tidak mempunyai bidang kuasa untuk bersidang dan mendengar rayuan ini.

Diputuskan, menolak rayuan dengan kos RM5,000:

(1) Ia adalah perayu sendiri yang membuat rayuan kepada Mahkamah Rayuan, dan ia adalah kewajipan perlembagaan mahkamah untuk mendengar dan memutuskan atas rayuan. Selanjutnya, ia adalah perayu yang membuat rayuan ini di hadapan mahkamah dan dalam berbuat demikian, perayu telah meletakkan dirinya kepada bidang kuasa mahkamah. Oleh demikian, dia tidak lagi boleh menimbulkan isu mempersoalkan bidang kuasa mahkamah (lihat perenggan 13).

(2) Responden pertama, Mahkamah Rayuan telah ditubuhkan di bawah

perkara 121(1) Perlembagaan Persekutuan ('Perlembagaan tersebut'). Bidang kuasa Mahkamah Rayuan sepertimana dinyatakan dalam Akta Mahkamah Kehakiman 1964 antara lain, adalah untuk menentukan rayuan-rayuan daripada keputusan-keputusan Mahkamah Tinggi dan bidang kuasa lain yang diberikan di bawah undang-undang persekutuan. Ia adalah dalam kapasiti tersebut juga yang mana responden pertama telah disaman (lihat perenggan 18).

(3) Alasan-alasan yang ditimbulkan oleh perayu dalam rayuan ini tidak mempunyai apa-apa merit. Peguam Negara telah mewakili responden-reponden di bawah kuasa beliau yang meluas sepertimana termaktub dalam perkara 145 Perlembagaan tersebut untuk menegakkan kesucian institusi keadilan. Kuasa meluas Peguam Negara di bawah perkara 145 Perlembagaan tersebut perlu termasuk kuasa mewakili bukan sahaja kerajaan tetapi juga mana-mana badan atau orang yang melaksanakan apa-apa fungsi di bawah Perlembagaan tersebut. Jelas ini adalah salah satu daripada kes sedemikian (lihat perenggan 21, 23 & 27).]

Notes

For cases on application for setting asside, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8791–8792.

Cases referred to

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11, CA (folld)

Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors [1988] 3 MLJ 149, SC (folld)

Legislation referred to

Courts of Judicature Act 1964
Federal Constitution arts 121(1A), 122B, 125, 127, 145, Part IX
Government Proceedings Act 1956 s 24, 24(2)
Rules of Court 2012 O 18 r 19, O 73 r 3

Appeal from: Civil Suit No MYY-22NCVC-14/18 of 2015 (High Court, Miri)

Tai Choi Yu (Tai Choi Yu & Co Advocates) for the appellant.
Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the High Court of Sabah and Sarawak at Miri made on 24 February 2016. The learned High Court judge had dismissed the appellant's application to strike out the memorandum of appearance filed by the senior federal counsel ('SFC') of the Federal Attorney General's Chambers on behalf of all the respondents.

[2] The striking out application was made under O 18 r 19 of the Rules of Court 2012 and its inherent jurisdiction. The memorandum of appearance was filed by the learned SFC in relation to a civil action by the appellant herein Tai Choi Yu as plaintiff, against all the three respondents.

[3] The brief background facts leading to the application by the appellant are these. The appellant is a firm of solicitors. The first respondent is the Court of Appeal established under the Federal Constitution and the laws of Malaysia. The second respondent was the Chairman of the Court of Appeal panel convened and presiding on 14 August 2014 and the third respondent was another member of the three presiding judges in that Court of Appeal panel hearing the Civil Appeal No Q-02(IM)-188–01 of 2014 ('the 2014 appeal').

[4] In the 2014 appeal the appellant herein was also the appellant. The 2014 appeal was in pursuance of to a civil action filed by the appellant as plaintiff in Miri High Court Suit No MYY-22–15/7 of 2013 ('the 2013 action') between Tai Choi Yu & Co Advocates against Ting Sie Chung @ Ting Sieh Chung. The said 2013 action was filed by the appellant seeking for a sum of RM995,517.49 being remuneration for legal work and services rendered. The defendant in the 2013 action filed a notice of application under O 18 r 19 of the Rules of Court 2012 to strike out the 2013 action. The learned High Court judge dismissed the striking out application. The defendant in the 2013 action then appealed to the Court of Appeal in the 2014 appeal. On 14 August 2014, the Court of Appeal ('the first respondent') overturned the decision of the High Court and struck out the 2013 action.

[5] The appellant however maintained that the Court of Appeal should have ordered for the 2013 action be reinstated and be remitted back to the High Court for a hearing on its merits. The basis of the appellant's complaint was that the respondents had not provided him with written grounds of decision in deciding the 2014 appeal. The appellant said he wrote several letters dated 9 June 2015, 25 June 2015 and 23 July 2015 respectively requesting for the written grounds of decision. However, there was no reply. Despite no grounds of judgment being made available to him, the appellant being dissatisfied with the first respondent's order dated 14 August 2014 proceeded to apply for leave in order to lodge an appeal against that decision at the Federal Court. The leave

application was dismissed on 21 May 2015. It was the appellant's contention that his failure in obtaining leave was contributed by the fact that there were no written grounds of decision from the first respondent to support the appellant's application for leave.

[6] As a result, the appellant filed a civil action in Civil Suit No MYY-22NCVC-14/8 of 2015 at Miri High Court against the respondents. This civil suit was filed seeking the following reliefs, as stated at para 24 of the statement of claim:

(1) an order that the High Court Suit No MYY-22-15/7-2013 be reinstated and to be reverted back to the High Court for hearing on its merits and on quantum meruit or on such terms as the High Court deems fit and just;

(2) a declaration that the said Order dated 14 August 2014 in the Court of Appeal Civil Appeal No Q-02(IM)-188-01/2014 is a nullity, null and void or void ab initio on the ground that it is unlawful being a deprivation or denial of access to the Courts, illegal and against public policy and is ultra vires the Constitution, arbitrary and oppressive and a gross miscarriage of justice or in breach of the established elementary rules of natural justice and further, with no reason given and without the written Grounds of Decision;

(3) a declaration that the Second Defendant acted in bad faith or was reckless or did not in good faith believe that she had jurisdiction to grant the said Order with no reason or Grounds of Decision given or for her refusal and inability to furnish the Grounds of Decision;

(4) a declaration that the Third Defendant acted in bad faith or was reckless or did not in good faith believe that she had jurisdiction to grant the said Order with no reason or Grounds of Decision given or for her refusal or inability to furnish the Grounds of Decision;

(5) a declaration that the Second and Third Defendants are unfit to be judges on the grounds of in bad faith, recklessness or absence of good faith and for their refusal to discharge their duties to give reasons or to furnish their reasoned Judgment for the said Order;

(6) such order reliefs as the Court deems just; and

(7) costs.

[7] The writ of summons was served on all the three respondents directly, addressed at the Istana Kehakiman Putrajaya and not served on the Attorney General's Chambers. The appellant said he did so in consonant with his stand that the action instituted by him is not a civil action against the government and the Government Proceedings Act 1956 has no application. It was also for that reason that the service of the writ was not made pursuant to O 73 r 3 of the Rules of Court 2012.

[8] The SFC, despite the suit not being a suit against the government had entered appearance and had filed a memorandum of appearance on behalf of all the three respondents on 17 August 2015. The appellant then vide High Court encl 6 and pursuant to O 18 r 19 filed an application to:

(a) set aside the memorandum of appearance filed by the SFC; and

(b) set aside the purported representation of the respondents by the Federal Attorney General's Chambers.

[9] The application was premised on the grounds:

(1) that the First Respondent is an independent arm established under the Federal Constitution on the principle of separation of powers of the legislative, the judiciary and the executive and therefore the representation by the Federal Attorney General's Chambers is unlawful, illegal and unconstitutional;

(2) that the Second and Third Respondents are not public servants or public employees and they do not come under the cognizance of the Public Services Commission and the Rules and Regulations thereto;

(3) the Second and Third Respondents hold office under contract in their personal capacities and are sued in their personal capacities and therefore they cannot be represented by the Federal Attorney General's Chambers;

(4) the Second and Third Defendants are independent contractees and they do not come within the purview of the Federal Attorney General's Chambers;

(5) being independent contractees, the Second and Third Respondents would be beholden or seen to be beholden to the executive arm of the Government of Malaysia if so represented and therefore the Second and Third Respondents' representation by the Federal Attorney General is a nullity, null and void and ultra vires the Constitution and not in accordance with the law; and

(6) such other grounds as stated in the affidavit in support affirmed by Tai Choi Yu dated 09.09.2015.

[10] After hearing the application, the learned High Court judge dismissed encl 6 on 24 February 2016 with costs of RM3,000. This appeal is by the appellant against that decision.

GROUNDS OF APPEAL

[11] The grounds of appeal as appeared in the memorandum of appeal mainly focused on the following issues:

(a) whether this Court of Appeal can hear this appeal;

(b) whether the respondents can be represented by the federal counsel of the Federal Attorney General's Chambers; and

(c) whether there is a need to file an affidavit in opposition in the circumstances of this appeal.

[12] The appellant, before submitting on the merits of the appeal, raised a preliminary issue before us that we, sitting on the panel of the Court of Appeal has no jurisdiction to sit and to hear this appeal. The appellant contended that the hearing of this appeal by us would tantamount to hearing an appeal against ourselves and thereby in breach of the established elementary rule of natural justice, *nemo judex in causa sua*, since the Court of Appeal is sued and named as a party.

[13] Our short answer to this issue was that it was the appellant himself who lodged the appeal to this court, and it is our constitutional duty to hear and decide on the appeal before us. The learned SFC in response to this preliminary issue had also pointed out that it was the appellant who lodged the present appeal before us and in doing so had submitted himself to the jurisdiction of this court. Therefore, he could not any longer raise issue questioning the jurisdiction of this court. We agreed with the learned SFC and we dismissed the preliminary issue raised and proceeded to hear the appellant's appeal on its merits.

[14] Before we proceeded to deliberate on the issues raised in this appeal, we noted that the third ground which was raised, that is on the need to file any affidavit, was not being canvassed before us by the appellant. Neither was this issue addressed in his written submissions. We therefore took the view that the appellant was no longer interested in pursuing this ground of appeal. We also found that the learned High Court judge had, in his grounds of judgment dealt with this issue at great length, of which we agreed.

[15] The essence of the appeal before us, relates to the capacity and the authority of the SFC in representing the respondents in the civil action by the appellant. Up to then the SFC had entered appearance and had filed the memorandum of appearance on behalf of the respondents. The appellant submitted that the representation by SFC would lead to a situation of conflict of interest and would undermine the independence of the judiciary if not real, at least on account of public perception. Furthermore, according to the appellant, the subject matter of the suit against the second respondent and the third respondent is made in their respective personal names and not to be taken as a suit against the government *a fortiori* the Attorney General has no locus to represent the respondents herein.

[16] We would begin our discussions firstly, by examining the nature of the action filed by the appellant. Having perused through the statement of claim we found it amply clear that the civil action herein is a civil action by the appellant made against the respondents and it pertains to the respondents' discharge of their duties and functions as the Court of Appeal, where the second respondent and third respondent sat as the adjudicating members. The fact that the second respondent and the third respondent are named in their personal names does not ipso facto make it a personal action against them.

[17] On the date in question the Court of Appeal presided over the 2014 appeal in the course of its constitutional duties and functions, where the second respondent and the third respondent were sitting as the panel members together with another panel member. We found it difficult to appreciate the stand taken by the appellant that the second respondent and the third respondent were not sued in their official capacities but in their personal names. It was not made clear by the appellant though, whether the appellant intended that to mean that the suit is a private and personal suit against the two respondents instead. And if so, how can a suit be treated as a personal suit bearing in mind that the allegation against the respondents were all matters that relate to, or in the course of them discharging their constitutional duties. This is further borne out by the pleadings of the appellant at para 2 of the statement of claim, which describes the first respondent as the Court of Appeal and the other two respondents were the presiding judges who made the impugned order.

[18] The first respondent, the Court of Appeal is constituted under art 121(1A) of the Federal Constitution. The jurisdiction of the Court of Appeal as stated in the Courts of Judicature Act 1964 amongst others, is to determine appeals from decisions of the High Court and such other jurisdiction conferred under federal laws. It is in that capacity too that the first respondent is being sued.

[19] Having established that position, we next proceeded to examine the constitutional functions and duties of the Attorney General. The starting point would be art 145 of the Federal Constitution. Article 145 defines the constitutional duties of the Attorney General in broad general terms. The Supreme Court in *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149 in dealing with this article held that 'Article 145 of the Constitution properly read gives ample power to the Attorney General to represent the government and any body or person performing any function under the Constitution'.

[20] The capacity of the Attorney General to represent a judge being sued in the course of administering and discharging his judicial function had earlier

been deliberated by this court in *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11. In that case, a legal suit was filed against a judge of the High Court. There was an application to prevent the Attorney General or his officers from acting for the judge which was dismissed. Having found that the judge was sued as a judge of the High Court and not in a personal or private capacity, the Attorney General was held to be duty bound and was under a mandatory duty to provide legal representation in order to defend and protect the office and the institution for the administration of justice in this country. The Court of Appeal in that case further added that, in absence of any factual or legal impediment, the Attorney General and his officer are legally bound to represent a judge in a legal suit.

[21] We would echo a similar sentiment and we agree with the decision of this court in *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* that the Attorney General being an officer established under the Federal Constitution must step in defence of judges sued in the course of performing their duties as in this case, in the protection of the institution of the judiciary and in the interest of administration of justice.

[22] We have given our consideration to the submission of the appellant in pressing the issue that s 24 of the Government Proceedings Act 1956 cannot be relied upon to justify the representation of the respondents by the Attorney General. For one thing the suit is not a suit against the government. It is also not a proceeding that entitles the Attorney General to act under s 24(2) because the respondents are not public officers and no certification in writing was shown by the Attorney General that this is a public interest litigation pursuant to s 24(2).

[23] We were in agreement with the appellant therefore that s 24 would have no application here. The suggestion by the appellant that s 24(2) can only be invoked upon certification in writing by the Attorney General too is of no application because by the appellant's own argument the suit filed by him is not even one against a public officer to begin with. As we have alluded to earlier, the representation by the Attorney General here is pursuant to his wide powers under art 145 of the Federal Constitution.

[24] Before we end our discussion, we are compelled to deal with the approach taken by the appellant in submitting that the suit is not one against a public officer. The appellant in his own submission before us as well as in his written submissions had stated that the second respondent and third respondent are not public officers by virtue of the fact that the '*Government of Malaysia has no power or jurisdiction to sack them and the Judiciary also has no*

power and jurisdiction to sack them: they can only be sacked by Parliament'. (Emphasis added.)

[25] We must say the appellant had an interesting way of defining public officer or rather in defining why the second respondent and third respondent are not public officers. In our view the simplest way to define who these respondents are, would be by referring to Part IX of the Federal Constitution. The second respondent and the third respondent are appointed under art 122B by the Yang di-Pertuan Agong. These respondents are judges of the Court of Appeal. In that same Part IX there are provisions that deal with tenure of office of judges, in particular art 125. This Article also lays down the process for removal of judges, which is through a tribunal constituted pursuant to art 125. There is no involvement of Parliament according to this part of the Constitution to give it any semblance of power for the removal of judges as submitted by the appellant. The only provision that says anything about Parliament in Part IX is that of art 127. Article 127 restricts Parliament from discussing the conduct of a judge except on a substantive motion of which proper notice must be given to the House. Hence far from empowering the removal of judges, the Federal Constitution prohibits Parliament from simply discussing the conduct of a judge without first fulfilling the requirement of art 127. Thus not only the statement made by the appellant is totally absurd but it goes against the main thrust of the appellant's case in upholding the doctrine of separation of powers.

[26] It had been the core contention of the appellant that the SFC cannot represent the respondents in order to maintain the independence of the judiciary and to observe the doctrine of the separation of powers. To suggest that Parliament has the authority to remove a judge would be a total defiance of that same doctrine. Thus the averment by the appellant that Parliament can remove a judge would not only be wrong in law but it would also go against the bone of contention propounded by the appellant in objecting to the representation by the attorney general in this case.

[27] In the final analysis we found the grounds raised by the appellant in this appeal are devoid of any merit. The Attorney General is representing the respondents under his wide ranging powers embedded in art 145 to uphold the sanctity of the institution of justice. The decision of the Supreme Court in *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors* remains a good law which binds us. We were further impelled to the view that the wide ranging powers of the Attorney General under art 145 of the Federal Constitution necessarily includes the power to represent not only the government but also any body or person performing any function under the Constitution. Clearly this is one of such case.

[28] In the result we dismissed the appellant's appeal with costs of RM5,000 with deposit refunded to the appellant. Both my learned brother Idrus Harun JCA and my learned sister Mary Lim Thiam Suan JCA had read this judgment in draft and concurred with the same.

Appeal dismissed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar